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7                   UNITED STATES DISTRICT COURT  
8                   WESTERN DISTRICT OF WASHINGTON  
9                   AT TACOMA

10 RUBEN E. SANCHEZ,  
11                   Plaintiff,  
12                   v.  
13 RUSTY SMITH, *et al.*,  
14                   Defendants.

Case No. C05-5426RBL

REPORT AND  
RECOMMENDATION

Noted for March 10, 2006

15                   This § 1983 Civil Rights matter has been referred to the undersigned Magistrate Judge pursuant to  
16 Title 28 U.S.C. §§ 636(b)(1)(A) and 636(b)(1)(B) and Local Magistrates' Rules MJR 1, MJR 3, and MJR  
17 4. This matter comes before the court because plaintiff has failed to respond to Defendant LeClaire's  
18 motion for summary judgment, (Doc.29). For the reasons set forth below, I recommend that the Court  
19 grant defendant's motion for summary and dismiss plaintiff's causes of action.  
20

DISCUSSION

21                   Summary judgment is proper only where "the pleadings, depositions, answers to interrogatories,  
22 and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any  
23 material fact and that the moving party is entitled to judgment as a matter of law." Fed.R.Civ.P. 56(c).  
24 The moving party has the burden of demonstrating the absence of a genuine issue of fact for trial.  
25 Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 257 (1986). Mere disagreement or the bald assertion that  
26 a genuine issue of material fact exists no longer precludes the use of summary judgment. California  
27 Architectural Building Products, Inc. v. Franciscan Ceramics, Inc., 818 F.2d 1466, 1468 (9th Cir. 1987),

1 *cert. denied*, 484 U.S. 1006 (1988). Local Rule CR 7(b)(2) requires each party opposing summary  
 2 judgment to file a response not later than 4:30 p.m. on the Monday immediately preceding the Friday  
 3 appointed for consideration, and Local Rule CR 7(b)(4) states:

4 If a party fails to file the papers required by subsections (1) or (2) hereof, or fails to appear  
 5 on the day appointed for argument if such be required by the court, such failure may be  
 6 deemed by the court to be an admission that the motion, or the opposition to the motion, as  
the case may be, is without merit.

7 (Emphasis added).

8 Here, defendants filed their motion for summary judgment on or about January 5, 2006 and  
 9 properly noted it for consideration on the court's February 6, 2006, motion calendar. Plaintiff has failed  
 10 to respond the motion for summary judgment, and was previously directed to file a response and advised  
 11 pursuant to Rand v. Rowland, 154 F.3d 952, 962-963 (9<sup>th</sup> Cir. 1998). *See* Doc. 13.

12 In his complaint, plaintiff names several defendants, including Dr. Jerry E. Le Claire. Plaintiff  
 13 alleges that Dr. LeClaire is a surgeon contracted by the Washington State Department of Corrections and  
 14 that as one of the defendants he is responsible for his eye care and his medical treatment while he has been  
 15 incarcerated.

16 Defendant LeClaire argue in his motion for summary judgment that plaintiff cannot establish that  
 17 Dr. LeClaire, a private physician, was a "state actor" or was engaged in "state action," and thus, the claims  
 18 are subject to dismissal as a matter of law. In support of their motion for summary judgment, defendant  
 19 attaches adequate legal authority supporting this argument. After reviewing the argument and statements  
 20 in support of his motion, the court should find that Dr. LeClaire was not a state actor when he treated Mr.  
 21 Sanchez. Dr. LeClaire was not under contract with and was not employed by the Washington State  
 22 Department of Corrections. Dr LeClaire was not a medical director or prison-based physician for the  
 23 Department of Corrections. Dr. LeClaire was at all times a private physician who accepted a referral from a  
 24 private physician, Dr. Berg, to provide medical attention to Mr. Sanchez. Dr. LeClaire's medical care was  
 25 always provided to Mr. Sanchez at a private medical facility. Dr. LeClaire's medical care, judgments and  
 26 treatments were free of State control, interaction or direction. Without rebuttal evidence, the Court should  
 27 find defendants' arguments persuasive.

#### 28 CONCLUSION

Because plaintiff has not responded to defendant's motion for summary judgment and defendants

1 have offered sufficient evidence to support their motion for summary judgment, the Court should GRANT  
2 Defendant LeClaire's motion. Pursuant to 28 U.S.C. § 636(b)(1) and Rule 72(b) of the Federal Rules of  
3 Civil Procedure, the parties shall have ten (10) days from service of this Report to file written objections.  
4 *See also* Fed.R.Civ.P. 6. Failure to file objections will result in a waiver of those objections for purposes  
5 of appeal. Thomas v. Arn, 474 U.S. 140 (1985). Accommodating the time limit imposed by Rule 72(b),  
6 the clerk is directed to set the matter for consideration on **March 10, 2006**, as noted in the caption.

7 DATED this Monday, February 13, 2006.

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9 */s/ J. Kelley Arnold*  
10 J. Kelley Arnold  
United States Magistrate Judge  
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